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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

No. 320

ROBERT W. JAFFKE, *Petitioner*,

v.

WILLIAM C. DUNHAM, Trustee of the Estate of Robert L. Knetzer, Bankrupt, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner, ROBERT W. JAFFKE, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered on May 2, 1957.

OPINION BELOW AND PRIOR OPINIONS IN THIS CAUSE

The opinion of the Court of Appeals ir question, printed at page 1a of the Appendix hereto, is reported in 243 F. 2d 460 (7th Cir.).

The prior opinion of the Court of Appeals entered on January 13, 1956, and modified on February 13, 1956, printed at page 8a of the Appendix hereto, is reported in 229 F. 2d 232 (7th Cir.).

The opinion of this Court reversing the judgment of the Court of Appeals for the 7th Circuit as referred to above and as amended on February 13, 1956, appears at page 17a of the Appendix hereto, and is reported in 352 U.S. 280, 1 L. Ed. 2d 314.

JURISDICTION

The judgment of the Court of Appeals was entered on May 2, 1957. The jurisdiction of this Court was invoked under 28 U.S.C. section 1254 and 11 U.S.C. section 47.

QUESTIONS PRESENTED

Where this court, in remanding and reversing the judgment of the Court of Appeals which had reversed the trial court's original judgment, ruled that the Court of Appeals erred in failing to consider documentary evidence stricken by the trial court and urged by appellee without cross appeal in support of the trial court's judgment, was it error for the Court of Appeals on remand to reverse the judgment of the trial court solely upon evidence stricken by the trial court?

The question is, when a Court of Appeals held that a trial court's finding of fact is not supported by the record without an affidavit which was first admitted and then stricken from the evidence in the trial court, and refuses

to consider such affidavit because there was no cross appeal filed, and then upon being directed by this court to consider the admissibility and weight of the affidavit since any evidence or exhibits in the record may be considered to affirm or sustain a trial court's judgment, did the Court of Appeals compound its error and unduly prejudice the appellee by considering other evidence or exhibits not admitted in evidence for the purpose of reversing a trial court's judgment; and particularly, where the appellant in his appeal did not assign as error or argue that the trial court's refusal to admit such evidence was error or a ground for a reversal of the trial court's judgment?

Another question in this case is whether or not the Court of Appeals applied the correct local law on the issue of imposing a constructive trust in a bankrupt's estate where the Court of Appeals in its opinion and reversal of the trial court's judgment refused to consider the duties of the trustee in the administration of a turnover order after the bankrupt's adjudication in bankruptcy and the bankrupt's relationship to an innocent third party at a time when such bankrupt was making payments under the turnover order?

STATEMENT

This cause came before the United States Court of Appeals for the 7th Circuit on remand pursuant to opinion and mandate of this Court in cause No. 60—October Term, 1956, opinion entered per curiam on January 14, 1957, and reported in 352 U.S. 280, 1 L. Ed. 2d 314, reversing and remanding the judgment of the Court of Appeals. The former judgment of the Court of Appeals for the 7th Circuit had reversed an order and judgment of the District Court for the Southern District of Illinois, Southern Division, sitting in bankruptcy which required the respondent as trustee of a bankrupt's estate to pay Twenty-seven Thousand Four Hundred Dollars ($27,400.00) to petitioner.

The Court of Appeals held in its opinion that the petitioner failed to prove that any specific portion of the money which he had given the bankrupt had become a part of the funds in the hands of the respondent since it did not consider the bankrupt's affidavit showing that specific monies received by the bankrupt from the petitioner became a part of the trustee's funds. This affidavit had been stricken from the evidence by the District Court, although it was a part of the record on the appeal to that Court.

This Court, in reversing and remanding this cause to that Court, stated that a successful party in the District Court may sustain its judgment on any ground that finds support in the record. The opinion further stated that if the District Court was in error in striking an admissible affidavit, a cross appeal was not a prerequisite for the Court of Appeals to rule upon the admissibility of the affidavit, and finding it admissible, to find that it afforded evidence in support of the District Court judgment. Since

the Court of Appeals had not considered the admissibility and weight of the affidavit, this Court remanded the cause to that Court for its consideration of those issues. Further, this Court in its remand directed that the Court of Appeals determine whether relevant admissible evidence in the case established a constructive trust under Illinois law.

On remand the Court of Appeals, without a rehearing in this cause, requested of the respective counsel that suggestions in typewritten form be submitted to the court directed to the questions of the admissibility of the bankrupt Knetzer's affidavit and the establishment of a constructive trust against the bankrupt's estate. On May 2, 1957, the court entered its opinion, again reversing the judgment of the trial court.

REASONS FOR GRANTING THE WRIT

A. The Effect of the Decision on Appeal From and Remandment to Lower Courts

This Court should grant this Petition not only because the Court of Appeals refused to follow the decision of this Court in this case and failed to obey its mandate, but also because the decision is in conflict with the decisions of this Court.

The decision of the Court of Appeals sought to be reviewed was rendered after remandment from this Court. Petitioner was the successful party in the district court. The findings of fact of the district court and the decree were favorable to Petitioner. The Court of Appeals had expressly refused to sustain the findings of the district court that the money which the bankrupt, Knetzer, had defrauded from Petitioner had, in fact, been paid over to Respondent, and it failed to consider the ruling of the trial court striking the statement of the bankrupt as there

was no cross-appeal by the Petitioner to this action of the trial court.

This Court, in its remanding opinion, held that Petitioner had the right to urge in the Court of Appeals any matter in support of the trial court's judgment which he had relied on at the trial, including matters overlooked or ignored by the trial court. This court in its opinion in 352 U.S. 280, 1 L. Ed. 2d 314 cited the cases of *United States vs. American Railway Express*, 265 U.S. 425 and *Langnes vs. Green*, 282 U.S. 531, as controlling decisions in this Court for a reversal of the Court of Appeals' decision.

Since the Court of Appeals did not consider the admissibility or the weight of the affidavit, the mandate of this Court required the consideration of those issues. In its opinion on remandment, the Court of Appeals stated:

> "The record in this case clearly shows that at the time the Knetzer affidavit was obtained, August 1, 1952, Jaffke, the Petitioner, had learned that Knetzer could not be trusted. Earlier in 1952 Jaffke had appeared before the grand jury in Springfield and testified. As a result of that grand jury hearing an indictment was returned against Knetzer on May 8, 1952, charging him with having obtained money by false representations from Jaffke in an amount exceeding $5,000.00, which was transported across state lines. (Appellee's Brief, Page 19.)"

And the court went on to say in the next to the last paragraph of its opinion:

> "The most serious threat of Knetzer serving a prison sentence was a pending indictment for fraud by the grand jury before which Jaffke had testified. This provided a very real reason for Knetzer to furnish any affidavit, even though false, requested by Jaffke which might help Jaffke recover at least part of the money Jaffke had paid to Knetzer."

The above quotations from the opinion in question here refer to an indictment which was introduced into evidence by the Petitioner as Exhibit No. 30 but was stricken in the trial court. Respondent, in his appeal, specifically excepted Exhibit No. 30 from his designation of the record. (Record, Page 174.) But, Petitioner in designating additional portions of the record included Exhibit No. 30 along with Exhibit No. 24, the affidavit of the bankrupt. Thus the Court of Appeals, in support of its reversal of the trial court's judgment, considered evidence stricken in the trial court.

The effect of this decision upon orderly appellate procedures may not be minimized. The Court of Appeals has initiated a rule that a losing party in the district court, on appeal, without assignment of error, may use evidence stricken on his own motion in the trial court as a basis for a reversal of the trial court's judgment. This is contrary to established law. A party on whose objection evidence was excluded cannot avail itself of such evidence in support of its contentions. It is in direct opposition to this Court's decision in this case that the Petitioner could urge any ground in the record in support of the trial court's judgment, where Petitioner was the successful party in the trial court and was endeavoring only to sustain the trial court's judgment.

The Court of Appeals, in its decision, committed substantial error in executing the mandate of this Honorable Court. It is settled law that an appeal will lie to correct this error and to cause a mandate to be executed according to its tenor and effect. *Cook vs. Porter, et al.*, 78 U.S. 672, 20 L. Ed. 84; *McMicken vs. Perin*, 20 How. 135; 15 L. Ed. 858; *Roberts vs. Cooper*, 20 How. 481, 15 L. Ed. 973. This Court said in *Baltimore and Ohio Railroad, et al. vs. United*

States of America, 73 L. Ed. 954, 279 U.S. 781 on page 956,

> "* * * When a lower federal court refuses to give effect to, or misconstrues, our mandate, its action may be controlled by this Court, either upon a new appeal or by a writ of mandamus."

When it becomes absolutely necessary to prevent injustice, as it appears the only interest of the Court of Appeals was to reinstate its prior reversal of the trial court's judgment, this Court should control its action. The lower court's decision is in conflict with the decisions of this court, and the conflict should be resolved by this Court.

B. The Effect of the Decision on Appellate Review of Trial Court Findings

It is a curious fact that the Court of Appeals in its original judgment reversing the trial court held that it could not consider evidence not admitted in the trial court to support the trial court's judgment without cross-appeal, but on remand considers evidence not admitted in the trial court as its grounds for a reversal of the trial court's judgment. This Court had directed the lower court to consider the admissibility and weight of Petitioner's Exhibit No. 24, and finding it admissible, to find that it afforded evidence in support of the district-court's judgment.

In substance, the Court of Appeals in its opinion sought to be reviewed here, held that it need not determine whether the statements in the affidavit were against the declarant bankrupt's pecuniary interest, as they fell short of having been made under circumstances regarded as rendering them trustworthy. (Page 5 of Opinion.) This simply went to the weight of the evidence, not to its admissibility. *F. W. Woolworth Co. vs. Contemporary Arts*, 97 L. Ed. 276, 344 U.S. 228. The affidavit was admissible and supported the trial court's finding that the Respondent Trustee had the possession of Petitioner's funds. Under the rules

of evidence applicable in Illinois and virtually every American jurisdiction following the common law of evidence, this affidavit would be admissible as an exception to the hearsay evidence rule. There was a necessity for the use of the declaration because the declarant was dead at the time of the trial. The declaration or statement was against the pecuniary interest of the declarant at the time it was made. Volume 20, Section 556 of American Jurisprudence states:

> "The theory under which declarations against interest are received in evidence notwithstanding that they are hearsay is that the necessity of the occasion renders the reception of such evidence advisable, and, further, that the reliability of such declaration is generally to be depended upon since a person does not ordinarily assert facts which are against his own pecuniary interest."

Also see Corpus Juris Secundum, Volume 31, Section 217 at 959.

The aforementioned cited requirements have been recognized in both Illinois and Federal decisions. *Keshner vs. Keshner*, 376 Ill. 354, 33 N.E. 877; *Friberg vs. Donovan*, 23 Ill. App. 58; *Hughes vs. Eldorado Coal and Mining Co.*: 197 Ill. App. 259; *Schell vs. Weaver*, 225 Ill. 158, 80 N.E. 95; and In Re Thompson, 205 Fed. 556; and *Clark and Jones vs. American Mutual Liability Insurance Company*, 112 Fed. Supp. 889 (1956).

The test it appears goes to a question of necessity and the fact that the statement was against the pecuniary interest of the declarant was enough to make it trustworthy. This doesn't necessitate a search into the veracity or character of the declarant, but goes to the weight. As a matter of fact in the instant case, there was no motive for the declarant to falsify. It was of no advantage to the bankrupt, Knetzer, to state that Respondent was possessed of Peti-

tioner's money because he thereby admitted the doing of the acts which were the essential elements of the crime for which he was charged in the indictment. It would appear that the indictment corroborated the affidavit and the indictment was offered for that purpose by Petitioner as Petitioner's Exhibit 30.

The circumstances surrounding the execution of the affidavit were testified to by R. W. Heinz, an Illinois attorney and an independent witness, who conferred with the bankrupt. (R. 103-104.) Heinz obtained permission to present the affidavit to the bankrupt from the proper government official. (R. 104.) He was present when the bankrupt signed the affidavit and admonished him as a prospective attorney for the bankrupt not to sign anything unless it was true. (R. 103.) The Respondent himself corroborated the declarations contained in the affidavit. (R. 88-89.)

Respondent's objection to the introduction of the affidavit was that it was an admission and hearsay. It was not offered as an admission, but as a declaration against interest. There is nothing in the statement that questions title to the money. It merely stated from whom the money was obtained and to whom it had been delivered. This distinction is clarified in 31 Corpus Juris Secundum, Second Section 217 at page 959 and In Re Thompson, 205 Fed. 556.

In addition, the record of payments by the bankrupt to Respondent sustained the trial court's finding of fact. (Petitioner's Brief, Page 8 and R. 193.) A finding of fact by a trial court must be clearly erroneous before disturbance by a court of review. Rule 52 (a) of Rules of Civil Procedure, *United States of America vs. National Assn. of Real Estate Boards, et al.*, 95 L. Ed. 1007, 339 U.S. 485; *United States vs. U. S. Gypsum Co.*, 92 L. Ed. 746, 333

U.S. 364; *Chain O. Mines vs. United Gilpin Corp.*, 109 F. 2d, 617; *Viles vs. Prudential Ins. Co.*, 107 F. 2d 696.

Other Circuit Courts of Appeals as well as this Court have held contrary to the decision questioned here reversing the trial court's finding and judgment. This decision and judgment should not be permitted to stand.

C. The Bankruptcy and Its Relation to Local Law on Constructive Trusts

This Court further directed the Court of Appeals in its remandment order to consider whether admissible evidence established a constructive trust under Illinois law. That court again ignored and misapplied applicable local law to this question and avoided facing the directions set forth in the mandate of this Court.

The trial court in its findings of facts, found all of the elements necessary to impress a trust. It cannot be forgotten that the Respondent obtained money in the form of payments under a turnover order and it is undisputed that Respondent failed to make even the most rudimentary investigation of the source of funds paid to him under that order. (R. 87, 79-80.) No evidence existed that the payments were concealed assets of the bankrupt. (R. 93-94.) The bankrupt, upon release from jail, was permitted to go where he pleased without a custodian, (R. 77, 85) and Respondent, in the face of a duty to inquire into the source of payments, accepted money payments from the bankrupt. To permit Respondent to retain property accepted with neither inquiry nor investigation when the circumstances commanded both, would be a harsh and inequitable result.

The Court of Appeals, in one of its own decisions, so held in the case of *Standard Oil Co. of Kentucky vs. Hawkins*, 74 Fed. 395, when it quoted from Ex Parte James, 9 Ch. at 609, and said on Page 400:

> "That a trustee in bankruptcy is an officer of the court. He has inquisitorial powers given him by the court, and the court regards him as its officer, and he is to hold money in his hands upon trust for its equitable distribution among creditors. The court, then, finding that he has money in his hands which, in equity, belongs to some one else, ought to set an example to the world, by paying it to the person really entitled to it. In my opinion, a court of bankruptcy ought to be as honest as other people"

This decision setting forth applicable Illinois law in this question was not considered by the court in its opinion. Other pertinent State and Federal decisions rendered by courts in Illinois and which have passed on this question are: *Winger vs. Chicago City Bank and Trust*, 394 Ill. 94, 67 N.E. 2d 265; *The People vs. State Bank of Maywood*, 354 Ill. 519; *Edgerton vs. Johnson*, 178 Fed. 2d 106, and *Soderstrom vs. Kungsholm Baking Co.*, 169 Fed. 2d 1008. All of the aforementioned decisions relate to the elements of a constructive trust, and detail the history of the problem of identification and tracing of funds impressed and indicate that recent decisions place a lesser burden on a claimant in identifying his property.

Only one case has been found which states the rule applicable to transactions occurring between a bankrupt and a third person subsequent to bankruptcy. This is a federal case in a sister state; the *City of New York vs. Rassner*, 127 Fed. 2d 703. It states the rule for tracing does not apply and was cited to this Court in Petitioner's brief to this Court, (Petitioner's Brief, Pages 15, 35 and 38). Also, this case was cited to the Court of Appeals on remand.

The Court of Appeals' refusal to comply with the mandate of this Court and its rendering of an opinion on an important question of local law in a way probably in conflict with applicable local questions results in a decision requiring review by this Court.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for certiorari should be granted.

Respectfully submitted,

WILLIAM M. GIFFIN

Attorney for Petitioner.

1st APPENDIX

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

No. 11508 SEPTEMBER TERM 1956 - APRIL SESSION 1957

In the Matter of
ROBERT L. KNETZER, BANKRUPT
ROBERT W. JAFFKE
Petitioner-Appellee,
v.
WILLIAM C. DUNHAM, AS TRUSTEE OF THE ESTATE OF ROBERT L. KNETZER, BANKRUPT
Respondent-Appellant.

On remand from the Supreme Court of the United States

May 2, 1957

Before DUFFY, *Chief Judge*, SWAIM and SCHNACKENBERG, *Circuit Judges.*

SWAIM, *Circuit Judge.* On January 13, 1956, this court reversed the judgment of the District Court which ordered that William C. Dunham, as trustee in bankruptcy, pay to the petitioner, Robert W. Jaffke, the sum of $27,400, on the theory that the petitioner had traced into the hands of the trustee that amount of funds which the bankrupt, Robert L. Knetzer, had procured from the petitioner by fraud. In our opinion, 229 F. 2d 235, we held that the evidence in this case was not sufficient to sustain the District Court's finding that Knetzer had paid over to the trustee the $36,000 which the bankrupt had obtained from the petitioner by fraud.

The Supreme Court of the United States granted certiorari, 351 U. S. 949, and reversed and remanded the cause to this court for our determination as to the admissibility and weight of an affidavit made by the bankrupt, Knetzer, on August 1, 1952. 352 U. S. 280.

In this affidavit Knetzer stated:

> "That during the period from December 7, 1950 to October 23, 1951, I, Robert L. Knetzer, borrowed the sum of $47,980.00 (Forty-seven thousand nine hundred eighty & no/100 dollars) from Robert W. Jaffke, of St. Louis, Missouri, and that during the period of December 7, 1950 to November 1, 1951, I paid the sum of $36,000.00 (Thirty-six thousand dollars) from the above borrowed sum of $47,980.00 to Wm. C. Dunham, Trustee in Bankruptcy of Robert L. Knetzer, for purposes of remaining out of jail. I am of sound mind and body and no threats or promises were made to me in order to obtain this statement."

The bankrupt died prior to the time the petition herein was heard. The trial court first admitted the bankrupt's affidavit, but at the conclusion of the hearing the court sustained the objection of the respondent-trustee to the

admission of the affidavit and struck it from the record as being inadmissible.

There is, and could be, no real dispute between the parties that the petitioner, under the facts of this case, was entitled to reclaim from the funds in the hands of the trustee in bankruptcy such amount, if any, as the bankrupt obtained from the petitioner by fraud and then traced into the hands of the trustee. See *People* v. *West Side Trust & Savings Bank*, 376 Ill. 339, 33 N.E. 2d 607; *Evans* v. *Moore*, 247 Ill. 60, 93 N.E. 118; *Woodhouse* v. *Crandall*, 197 Ill. 104, 64 N.E. 292; *Union National Bank of Chicago* v. *Goetz*, 138 Ill. 127, 27 N.E. 907. There was conflict in the evidence as to whether the bankrupt had obtained the money in question from the petitioner by fraud, but there was sufficient evidence to sustain the finding of the trial court that the petitioner was induced by the fraudulent misrepresentations of the bankrupt to pay most of the money which he paid over to the bankrupt, and the evidence showed that there were sufficient funds in the hands of the trustee to pay to Jaffke the amount claimed by him as a preferred claim. The petitioner contends that the District Court erred in granting the trustee's motion to strike the Knetzer affidavit from the record. Petitioner insists that the affidavit by Knetzer was a declaration against the pecuniary interest of the bankrupt and that since the bankrupt was dead at the time of the hearing the court should not have struck the affidavit from the record.

To determine this question it is necessary to review again some of the facts involved in the bankruptcy matter. Knetzer was adjudged a bankrupt on October 21, 1948. On August 11, 1949, the trial court found that Knetzer owned and was concealing assets in the amount of $250,000. The court then ordered Knetzer to turn over that amount to the

trustee in bankruptcy on or before November 1, 1949. On Knetzer's failure to comply with the court's order, he was found, on December 1, 1949, to be in contempt of court and was sent to jail to be confined until the turnover order was complied with. On different occasions Knetzer was released from jail on his solemn promise that he could and would procure the $250,000 and pay it to the trustee and thereby purge himself of contempt. However, Knetzer turned over to the trustee a total of only $79,923.72. On January 27, 1950, the trustee explained to the creditors that Knetzer was hopelessly insolvent; that all of his assets had been converted into cash; that the trustee had on hand only, $74,000; and that claims of over $3,500,000 had been filed in the bankruptcy matter. It was thus clearly shown that there was no possibility of there ever being any surplus in the hands of the trustee which would be payable to the heirs of Knetzer, who had died on August 26, 1953, leaving a widow and two children.

The record here is replete with evidence that Knetzer's sole purpose before he was adjudged a bankrupt was to defraud as many people as possible out of their money by false pretenses. After Knetzer was adjudged a bankrupt and sent to jail for contempt his primary purpose was to get out and stay out of jail and to accomplish this purpose he did not hesitate to do or say anything he considered necessary to obtain the funds required to purge himself of contempt and to avoid criminal prosecution.

The record in this case clearly shows that at the time the Knetzer affidavit was obtained, August 1, 1952, Jaffke, the petitioner, had learned that Knetzer could not be trusted. Earlier in 1952 Jaffke had appeared before the grand jury in Springfield and testified. As a result of that grand jury hearing an indictment was returned against Knetzer

on May 8, 1952, charging him with having obtained money by false representations from Jaffke in an amount exceeding $5,000, which was transported across state lines. (Appellee's brief, page 19.) On the last $4,800 which Jaffke turned over to Knetzer in October of 1951, Jaffke required that Knetzer give him security. When the petitioner was asked why he required security on this last loan, he replied, "I had realized that this man [Knetzer] could not be trusted." Yet, knowing that Knetzer could not be trusted and that he was then in jail for contempt and facing trial on the indictment charging fraud, Jaffke prepared the affidavit here in question.

On page 39 of the appellee's brief in this court counsel for Jaffke frankly admit that: "It can be fairly stated that the trial court was not lenient in its rulings when plaintiff was presenting his case in chief, and strictly followed the rules of evidence applicable thereto." This blanket endorsement of the trial court's action on the question as to the admissibility of evidence included the court's refusal to permit the petitioner to answer the question as to whether Knetzer told him how much of the money Knetzer had received from him was paid over to the trustee in bankruptcy, and the striking of petitioner's answer that he received the information for the affidavit from Knetzer. Without these bits of testimony, Knetzer's affidavit stating that he paid $36,000 of the money he had "borrowed" from Jaffke to the trustee was the only evidence on which the tracing of petitioner's money into the hands of the trustee could stand.

We agree that a declaration against the declarant's existing pecuniary or proprietary interests by one with personal knowledge of the facts declared may, under certain circumstances, be properly admitted in evidence, but we do

not believe that this record discloses facts sufficient to bring the Knetzer affidavit within the exception to the hearsay rule of evidence even as that rule is stated by the petitioner. The petitioner states the claimed exception to the hearsay rule as follows: "However, where there is a necessity for the use of the declaration usually because the declarant at the time of the trial is dead, and *where the declaration is made under circumstances regarded as rendering it trustworthy,* and usually where the declaration or statement is against the interest of the declarant *at the time he makes the statement or declaration,* the declaration is admissible in evidence." (Emphasis added.)

We need not determine whether the statements in the Knetzer affidavit were against Knetzer's pecuniary interest. If the statements in the affidavit were against his pecuniary interest they fell far short of having been "made under circumstances regarded as rendering [them] trustworthy," one of the requirements which the petitioner admits was necessary to make the affidavit admissible. As we pointed out above, the trial court at first admitted Knetzer's affidavit, but after hearing all of the evidence in the case the trial court granted the trustee's motion to strike the affidavit from the record. The trial court could not have listened to all of the evidence in this case without realizing that statements made by Knetzer, sworn or unsworn, could not be relied upon. The most serious threat of Knetzer's serving a prison sentence was the pending indictment for fraud by the grand jury before which Jaffke had testified. This provided a very real reason for Knetzer to furnish any affidavit, even though false, requested by Jaffke which might help Jaffke recover at least part of the money Jaffke had paid to Knetzer.

The trial court properly struck the Knetzer affidavit from the record and without that affidavit no part of the money obtained by Knetzer from Jaffke was traced into the hands of the trustee.

The judgment of the trial court must be and it is

REVERSED.

A true Copy:

Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit.

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

No. 11508. JANUARY SESSION, 1956, OCTOBER TERM, 1955.

In the Matter of
ROBERT L. KNETZER, Bankrupt.

ROBERT W. JAFFKE,
Petitioner-Appellee,
vs.
WILLIAM C. DUNHAM, as Trustee of the Estate of ROBERT L. KNETZER, Bankrupt,
Respondent-Appellant.

Appeal from the United States District Court for the Southern District of Illinois, Southern Division.

January 13, 1956.

Before DUFFY, *Chief Judge*, SWAIM and SCHNACKENBERG, *Circuit Judges.*

SWAIM, *Circuit Judge.* This is an appeal from an order of the United States District Court for the Southern District of Illinois, Southern Division, sitting in Bankruptcy

in the Matter of Robert L. Knetzer, Bankrupt. The order appealed from required the trustee of the bankrupt estate to pay from the funds in his possession to the petitioner, Robert W. Jaffke, the sum of $27,400.00 which the court found that the bankrupt, Robert L. Knetzer, had procured from Jaffke by fraud subsequent to October 21, 1948, the date on which Knetzer had been adjudged a bankrupt.

The fraud by which Knetzer was alleged to have induced the petitioner to give him the money which petitioner seeks to reclaim from the trustee in bankruptcy consisted of representations by Knetzer to the petitioner made during the period from December 7, 1950, to and including March of 1951. These representations were that he (Knetzer) was the manager of a large corporation known as the Bison Construction and Mining Corporation in which a number of well to do men were interested; that this corporation of well to do men were interested; that this corporation was to build a large number of homes in a housing project near the Air Force Base at Great Falls, Montana; that a similar project which Knetzer had just finished promised to pay a 50 per cent profit; that an influential man was arranging for a loan to the corporation from the Reconstruction Finance Corporation, but that it was such a large scale operation that it would take two years to complete it and that in order to initiate the business the corporation needed money then; and that the investors in this project would share pro rata in the profits.

Jaffke's petition alleges that these representations by Knetzer were false and were known to Knetzer to be false but that they were believed by Jaffke to be true, and that by these false representations Knetzer induced Jaffke to give him for investment in the project money in the total sum of $47,980.00.

In the hearing on Jaffke's petition, Jaffke testified that because of Knetzer's false representations he (Jaffke) paid to Knetzer during the period between December 7, 1950 and October 22, 1951, both dates inclusive, a total of $47,980.00. Jaffke's petition alleged that of this amount Knetzer turned over to the defendant trustee the sum of $36,000.00.

In arriving at the amount of $27,400.00, which the trial court ordered that the petitioner recover from the trustee, the court apparently subtracted from the amount alleged to have been paid to the trustee by Knetzer, $3,800.00 which Jaffke admitted that he knew was to be paid to the trustee to keep Knetzer out of prison, and $4,800.00 which Jaffke admitted had been repaid to him by a relative of the bankrupt.

In seeking to set aside the order of the trial court the appellant trustee questions the admission of certain evidence which was received in the hearing on Jaffke's petition. The appellant first questions the competence of the testimony of the petitioner as to his dealings with Knetzer. The objection to this testimony is based on Section 2 of the Evidence Act of the State of Illinois, Illinois Revised Statutes, c. 51 § 2 (Bar Association Edition 1955). This statute provides in part:

> "No party to any civil action, suit or proceeding, or person directly interested in the event thereof, shall be allowed to testify therein of his own motion, or in his own behalf, by virtue of the foregoing section, when any adverse party sues or defends as the trustee or conservator of any habitual drunkard, or person who is mentally ill or mentally deficient, or as the executor, administrator, heir, legatee or devisee of any deceased person, or as guardian or trustee of any such heir, legatee or devisee * * *."

The testimony of the petitioner was objected to on the ground that he was an "interested party" within the meaning of the statute for the reason that the respondent trustee was acting not only as trustee in bankruptcy for the creditors but also as trustee and representative for the widow and minor children who were heirs of the deceased bankrupt. The bankrupt, Knetzer, died prior to the hearing on the petition and left a widow and children.

We think this objection was not well taken. The obvious purpose of the Illinois statute is to protect persons under disability and the heirs of deceased persons, and Knetzer's heirs did not stand to gain anything out of the bankruptcy estate. During the period of time in which the false representations were made the bankrupt, Knetzer, was engaged in attempts to comply with a court order to turn over to the trustee the sum of $250,000.00, which represented the amount of assets which the court had found that Knetzer owned and had concealed. On Knetzer's failure to comply with the turn over order he was found to be in contempt of court and was sent to jail. The court permitted Knetzer to leave the jail on different occasions in the custody of the United States Marshal or of bailiffs of the court. This permission was granted on Knetzer's promises that he could and would use his freedom to procure the required $250,000.00 and thereby purge himself of contempt. During the period from December 7, 1950 to November 16, 1951, Knetzer procured and turned over to the trustee a total amount of only $79,923.72.

On January 27, 1950, the trustee wrote a letter to Knetzer's creditors explaining that Knetzer was hopelessly insolvent; that all of his assets had been sold and turned into cash; that the trustee then had on hand a total of

$74,000.00; and that claims in the total amount of $3,844,776.54 had been filed in the Knetzer bankruptcy matter.

From these undisputed facts it seems certain that Knetzer's only interest in his bankruptcy matter while he was alive was to try to get out or stay out of jail. It was certain that the trustee at the close of the bankruptcy proceeding could have nothing left to turn back to Knetzer. It follows that after Knetzer's death there could be nothing left to turn over to Knetzer's heirs. The contest here over the funds in the trustee's hands could only affect the petitioner and the other creditors. Under these circumstances we think the trial court did not err in admitting Jaffke's testimony as to his transactions with Knetzer.

The trustee points out that the petitioner filed this action against both Knetzer and the trustee; but the record shows that after the death of Knetzer, his death was suggested to the court and the action then proceeded against the trustee alone, pursuant to Rule 25 of the Federal Rules of Civil Procedure.

After carefully reviewing all of the evidence in this case it seems clear that there was a sufficient basis for the trial court's finding that Jaffke did pay to Knetzer the total sum of $47,980.00 because the petitioner believed the false statements that Knetzer made to him concerning the fictitious construction and mining corporation and the likelihood of large returns for those investing in it. But petitioner's proof that he had been so defrauded by Knetzer was not enough to establish the preference he sought over the other creditors. Most of the claimants in this bankruptcy matter had also been defrauded by Knetzer's representations that he would sell and deliver to them automobiles and tractors which Knetzer knew he could not deliver. But by these representations Knetzer induced them

to make large deposits on the purchase price of automobiles and tractors which they ordered. Jaffke himself had been so defrauded by Knetzer to the extent of $11,300.00, for which Jaffke's attorneys filed for him a general claim with the trustee in bankruptcy.

But in the instant proceeding Jaffke claims that since Knetzer, after he had been adjudged a bankrupt, procured the amount of $47,980.00 from him by fraud and then paid $36,000.00 of that amount to the trustee, the money so paid did not become the property of the trustee because it was impressed with a trust in favor of the petitioner. Thus, argues the petitioner, he is entitled to recover the amount of $36,000.00 from the assets in the hands of the trustee.

To support his claim on this theory it was just as necessary for the petitioner to prove that the $36,000.00 was paid to and became a part of the funds in the hands of the trustee as it was to prove that Knetzer had procured this money by fraud. This we think the petitioner has failed to do. It is true that Knetzer in August 1952, while in jail, executed an affidavit stating that of the money he received from Jaffke he paid $36,000.00 to the trustee. This affidavit was tentatively received in evidence over the objection of counsel for the trustee but at the conclusion of the hearing the trial judge sustained the objection and the trustee's motion to strike Knetzer's affidavit from the record. There was no cross-appeal by the petitioner to question this action by the trial court, and this court may not consider Knetzer's affidavit as evidence in this case.

At the top of page 19 of petitioner's brief in this court we find the following statement:

> "Plaintiff's Exhibit No. 29 offered in evidence is a record of a prior proceeding, pursuant to an ad-

> joumed creditor's meeting, in this bankruptcy cause wherein Knetzer admitted under oath in open court, that since his bankruptcy he obtained more than Forty Thousand Dollars ($40,000.00) from plaintiff; and from which sum, payment had been made to William C. Dunham, his trustee under the turnover order (Tr. 160; original record 291-301)."

The original record to which we are thus cited does show that Knetzer testified that he had received from Jaffke more than $40,000.00 but it does not show what part, if any, of that amount was paid to the trustee. Even if the record had shown that Knetzer testified in that former hearing as petitioner claims, his testimony could not be considered as evidence in this matter because the trial court also granted the motion of counsel for the trustee to strike from the evidence the entire record of that former hearing.

Without the affidavit of Knetzer we find no sufficient evidentiary basis for the finding of the trial court that $36,000.00 of the money which Jaffke paid to Knetzer was delivered by Knetzer to the trustee. The order of the trial judge to turn over his concealed assets in the amount of $250,000.00 was served on Knetzer July 11, 1949. On November 1, 1949, the trustee reported that Knetzer had not complied. Knetzer was then ordered to appear on November 15, 1949, and show cause why he should not be adjudged in contempt. On December 1, 1949, Knetzer was held to be in contempt and ordered committed to jail until he had obeyed the turn over order, but execution of this order was stayed until January 11, 1950.

The evidence and stipulations of the parties indicate that others than Jaffke had been defrauded by Knetzer on the same story that Knetzer had told to Jaffke. These other persons included Riley, Petty and Sammons. Prior to

any payments to Knetzer by Jaffke, Riley paid Knetzer, between June 28, 1950 and September 15, 1950, the total sum of $32,389.00. Between April 14, 1951 and July 1951, Petty paid Knetzer $44,000.00; and between October 1, 1951 and February 1, 1952, Sammons paid Knetzer $101,550.00. Jaffke's payments to Knetzer amounted to $47,980.00 and were made between December 7, 1950 and October 22, 1951. The total amount thus paid to Knetzer by these four men was $225,919.00. Of this amount Knetzer paid to the trustee during the period here in question only $79,923.00. It is evident, therefore, that $145,996.00 of the amount Knetzer received from these four men was not paid over to the trustee.

During the month of December 1950 Knetzer made payments to the trustee in the total amount of $11,500.00. This amount might have been paid from the $250,000.00 in assets which the court found that Knetzer owned and had concealed, from the funds Riley had paid to Knetzer, or from the money Jaffke had paid to Knetzer. Although Knetzer was being pressed for payments on the turn over order he paid nothing further to the trustee during the months of January, February and March of 1951. During the months of April, May and June of 1951 Knetzer, or some one in his behalf, paid to the trustee $55,923.72. During that period Knetzer, in addition to the funds he had received from Riley and Jaffke, also received from Petty $44,000.00 which Knetzer may have paid to the trustee as part of the total paid to the trustee during that period. The last six payments of $1,000.00 each made by Knetzer to the trustee may have been from the $101,550.00 which Sammons paid to Knetzer between October 1, 1951 and February 1, 1952, or they may have been from the payments made by any one of the other three men from whom Knetzer had fraudulently procured funds.

A finding of fact by a trial court may not be based on a guess of what might have happened. It can only be grounded on evidence which supports a reasonable inference as to what did happen. We find no evidence remaining in this record after the Knetzer affidavit was excluded to justify an inference that $36,000.00 of Jaffke's money was paid over to the trustee.

The judgment is REVERSED and the cause remanded for further proceedings consistent with the views expressed in this opinion, with instructions to enter Judgment for the *Respondent-Appellant.*

SCHNACKENBERG, *Circuit Judge,* concurring. I concur in the foregoing opinion, with the exception that I believe the judgment should be reversed and there is no need for a remandment. Upon the hearing in the district court both parties had an opportunity to, and did, offer evidence which they considered relevant to all issues presented there and later in this court. There is no occasion now for a further hearing. Both sides have had their day in court.

(Per Order of February 13, 1956)

A true Copy

Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit.

3d APPENDIX

ROBERT W. JAEFKE, Petitioner,

v.

WILLIAM C. DUNHAM, Trustee of the Estate of Robert L. Knetzer, Bankrupt

352 US —, 1 L ed 2d 314, 77 S Ct —

[No. 60]

Argued December 12, 1956. Decided January 14, 1957.

SUMMARY

On certiorari to review a judgment of the United States Court of Appeals for the Seventh Circuit (229 F2d 232) reversing an order of the United States District Court for the Southern District of Illinois, sitting in bankruptcy, the Supreme Court reversed the judgment below and remanded the case to the Court of Appeals. The facts and holding of the Court are stated in the brief Per Curiam opinion infra.

HEADNOTES

Classified to U.S. Supreme Court Digest, Annotated

Appeal and Error § 1256—sustaining judgment below

1. On appeal a successful party in the District Court may sustain its judgment on any ground that finds support in the record.

Appeal and Error § 1262—necessity of cross appeal—sustaining judgment

2. If the District Court was in error in striking an admissible affidavit offered by the successful party, a cross appeal is not a prerequisite for the Court of Appeals to rule on the admissibility of the affidavit, and finding it

admissible, to find that it afforded evidence in support of the District Court's judgment.

Appeal and Error § 1692.2—remand—to consider affidavit

3. The Supreme Court will remand to the Court of Appeals a case in which that court failed to consider the admissibility and weight of an affidavit offered by the successful party in the trial court, because erroneously assuming that a cross appeal was a prerequisite to such consideration.

Courts § 878—federal courts—applying state law—bankruptcy

4. Whether a constructive trust is established by a bankrupt's payment to the trustee in bankruptcy of money obtained by the bankrupt by fraud from the claimant is a question governed by the law of the state in which the bankruptcy court is sitting.

APPEARANCES OF COUNSEL

Herbert J. Miller, Jr., of Washington, D. C., argued the cause for petitioner.

G. William Horsley, of Springfield, Illinois, argued the cause for respondent.

OPINION OF THE COURT

Per Curiam

We granted certiorari in this case to review a judgment of the Court of Appeals for the Seventh Circuit, 229 F2d 232, reversing an order of the District Court for the Southern District of Illinois, sitting in bankruptcy, which required respondent as trustee of a bankrupt's estate to pay $27,400 to petitioner. 351 US 949, 100 L ed 1473, 76 S Ct 847. The District Court's order was based on a finding that subsequent to the date of the adjudication of bankruptcy, the bankrupt had obtained money by fraud from the petitioner and had turned over $27,400 of that money

to respondent. At the hearing before the District Court, petitioner had sought to introduce into evidence an affidavit in which the bankrupt stated that he had paid $36,000 of the money he had received from petitioner to the respondent. At the conclusion of the hearing, the District Court sustained respondent's motion to strike the affidavit.

On appeal, the Court of Appeals held that petitioner had failed to prove that any specific portion of the money that he had given the bankrupt became a part of the funds in the hands of respondent. Because petitioner had not cross-appealed, the Court of Appeals held that it could not consider the action of the District Court in striking the bankrupt's affidavit from the record.

Headnotes 1 and 2

Headnote 3

A successful party in the District Court may sustain its judgment on any ground that finds support in the record. If the District Court was in error in striking an admissible affidavit, a cross-appeal was not a prerequisite for the Court of Appeals to rule on the admissibility of the affidavit, and finding it admissible, to find that it afforded evidence in support of the District Court judgment. United States v. American R. Exp. Co. 265 US 425, 435, 436, 68 L ed 1087, 1093, 1094, 44 S Ct 560; Langnes v Green, 282 US 531, 538, 539, 75 L ed 520, 524, 525, 51 S Ct 243. Since

the Court of Appeals did not consider the admissibility and weight of the affidavit, we remand to the Court of Appeals for its consideration of those issues.

Headnote 4

The claim in this case is that relevant admissible evidence established a constructive trust. Whether it did so or not is a question of Illinois law. The Court of Appeals, in the view it took of the case before it, did not reach this local question. On remand, that question too must be considered by the Court of Appeals.

Reversed and remanded.